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In The Supreme Court of the United States

October Term, 1996

State Oil Company,
Petitioner,
v.
Barkat U. Khan, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL BEER WHOLESALERS ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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BRIEF *AMICUS CURIAE* OF THE NATIONAL BEER WHOLESALERS ASSOCIATION, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The National Beer Wholesalers Association, Inc. ("NBWA") is a nonprofit voluntary business association incorporated under the laws of the Commonwealth of Virginia.[1] The NBWA is a trade association representing the interests of 1,741 beer wholesalers who serve both suppliers and retailers. As the middle tier of a three-tier distribution system mandated in almost every state,[2] beer

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[1] Consent to the filing of this brief, which was obtained from counsel for both parties, has been filed with the Clerk of this Court.

[2] With the exception of micro-breweries and brew-pubs where all three functions—brewing, wholesaling and retailing—are combined, all states except Massachusetts and Wisconsin mandate a three-tier

wholesalers have a special understanding of the competitive consequences of vertical distribution restraints. The proper application of the antitrust laws to pricing arrangements between wholesalers and their suppliers and retailers is central to the effective operation of the free market distribution system. In addition, because every state except Indiana either permits or requires brewers to designate exclusive territories for their wholesalers,[8] NBWA members have a direct interest in this case, especially insofar as it involves an application of the rationale of *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

STATEMENT

This is a classic case whereby a supplier has an interest in the price charged by the dealer because the price otherwise may not be consistent with the competitive plan adopted by the supplier and agreed to by the dealer. The maximum resale price upon which the dealer and supplier agree presents no credible threat of becoming either part of a minimum vertical price agreement or of a horizontal cartel among dealers or suppliers.

Petitioner State Oil Company is a petroleum supplier which sold gasoline to a dealer at a wholesale price determined by subtracting 3.25 cents per gallon from the suggested retail price set by the supplier. Under the terms of the contract, if the dealer sold gasoline at a price higher than the suggested retail price, he was required to rebate the excess to the supplier. Because the dealer's volume would presumably decrease at the higher price (under the laws of supply and demand), and the dealer would not be allowed to keep the increased margin per gallon, the dealer

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system of distribution of beer. Steve L. Barsby & Assocs., Inc., BEER WHOLESALERS: THEIR ROLE AND ECONOMIC PERFORMANCE 13 (2d ed. 1995).

[8] Of these, 29 states mandate exclusive territories. S. Barsby, *supra* note 2, at 6-7.

was effectively foreclosed from charging more than the suggested retail price.

When the supplier terminated the contract to pay the agreed-upon amount, the dealer, Khan, sued, alleging, *inter alia*, price fixing in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Summary judgment for defendant State Oil Company was granted by the trial court on the alleged price fixing charge because, it said, under the Sherman Act the legality of that conduct was to be "considered under 'rule of reason,' not *'per se,'* analysis," (Pet. App. 35a), and the plaintiff had presented no evidence on the essential elements of a rule of reason case. However, the Seventh Circuit, relying upon *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), reversed because the practical effect of the contractual arrangement was "maximum price fixing" and because "the Supreme Court has thus far refused to reexamine the cases in which it has held that resale price fixing is illegal *per se* regardless of the competitive position of the price fixer or whether the price fixed is a floor or ceiling." Pet. App. 4a & 6a.

SUMMARY OF ARGUMENT

The *per se* rule set forth in *Albrecht* shelters opportunism and forces suppliers and wholesalers to use less efficient distribution alternatives. This rule is plainly inconsistent with the "consumer welfare" and "competition based on efficiency" premises of modern antitrust law articulated by this Court during the past two decades. *Albrecht* (decided in 1968) is an historic relic. Its *Schwinn*-derived premise—that exclusive territories are illegal *per se*—was overturned by this Court in *Sylvania* in 1977.

The flat *Albrecht* prohibition should be replaced by the rule of reason for the reasons articulated in *Sylvania*. Both types of restraints—maximum RPM and vertical nonprice restraints—are adopted to encourage efficient distribution of the supplier's product in a context that may

include exclusive arrangements. Both are adopted to intensify interbrand competition.

Maximum RPM does not eliminate any interbrand price competition; it does eliminate sales-retarding opportunism; and it directly benefits consumers by assuring that price promotions are actually offered to them. Maximum RPM is different in purpose and effect from minimum RPM, and does not present any credible risk of becoming a vehicle supporting a horizontal cartel among suppliers or dealers.

The *Albrecht* rule should be reversed just as other outmoded antitrust doctrines were overturned by this Court in *Sylvania* and *Copperweld*.

ARGUMENT

In *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), this Court repudiated its ten-year old rule of *per se* illegality applied to exclusive territories and other nonprice vertical restraints. In adopting a rule of reason for evaluating such restrictions, *Sylvania* specifically left undisturbed the *per se* rule first applied to vertical minimum price restraints in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), that had been extended to maximum resale price maintenance ("RPM") in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). *See Sylvania*, 433 U.S. at 51 n. 18. In the intervening 20 years, the Court has had several opportunities to review both minimum and maximum vertical price restrictions, and has substantially narrowed their scope,[4] but it has not directly considered whether the *per se* rule applicable to maximum RPM should be continued.

[4] In *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752 (1984), and *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988), the Court limited the *per se* prohibition of vertical price agreements by establishing more stringent evidentiary requirements. Plaintiffs must now demonstrate that an agreement had been reached (a mere showing of coercion is not enough) and that the agreement set a specific price or price levels. And in *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 339 (1990) ("*ARCO*"), the Court held that a competitor could not suffer antitrust injury as a matter of law where the maximum price was not predatory.

This case directly presents the Court with the question of whether to reconsider *Albrecht*, perhaps the most heavily criticized relic of antitrust's "mothball fleet,"[5] and to apply a consistent test for vertical distribution restrictions designed to ensure effective product promotion and service. We urge the Court to take advantage of this opportunity and to overrule *Albrecht*.

I. THE *ALBRECHT* RULE OF *PER SE* ILLEGALITY IS HARMFUL TO CONSUMER INTERESTS, ERRONEOUSLY INSULATES OPPORTUNISM AND UNDERCUTS THE BENEFITS OF EXCLUSIVE TERRITORIES

Price ceilings on the resale of a product, or their more costly surrogates,[6] are adopted by suppliers and dealers[7] to ensure that a product or service is not overpriced and that the full benefits of exclusive territorial agreements are obtained. Consumers benefit from maximum RPM because it lowers prices and assures greater product availability. Dealers recognize that maximum price limits are necessary adjuncts to grants of protected intrabrand territories and that they serve to prevent free-riding opportunism. Suppliers seek these price agreements with dealers to maximize sales and fully penetrate markets. And pub-

[5] *See* R. Steuer, *Monsanto and the Mothball Fleet of Antitrust*, 30 Antitrust Bull. 1 (1985).

[6] *See* discussion pp. 13-14, *infra*.

[7] Maximum RPM is used in two-tier (supplier-dealer) and three-tier (supplier-distributor-retailer) arrangements. This Brief uses the supplier-dealer terms to describe both except when referring to the beer industry where the terms used are brewer-wholesaler-retailer.

lic welfare is enhanced by maximum RPM because increased output and allocative efficiency result. *See, e.g.*, F. Easterbrook, *Maximum Price Fixing*, 48 U. Chi. L. Rev. 886, 891-900 (1981).

A. Exclusive Territories Are Important Tools for Efficient Distribution Systems Which Benefit Consumers, Suppliers and Dealers

Exclusive territories and related nonprice vertical restraints limiting *intra*brand competition are justified because they strengthen *inter*brand competition. They are adopted to encourage and protect dealer promotion of a product or service through advertising, pre- and post-sale servicing, warranties, market evaluation, and numerous other services. *Sylvania*, 433 U.S. at 54-55.

Beer, for example, is a perishable product. Both draft and bottle must be rotated—between 45 and 60 days for draft beer and between 90 and 150 days for bottle beer [8] —to ensure the beer's fresh taste. Beer wholesalers prevent product deterioration by assisting retailers (subject to the limitations of state law) in product shelving and inventory control and by accepting returns. These services benefit brewers by enhancing the value of their brands. Beer wholesalers also work closely with brewers to identify market trends and to install product displays as well as to advertise and otherwise promote their brands. In return for exclusive territorial rights, beer wholesalers have an obligation to serve all retail outlets in their assigned territory and to provide such services. The result of these bilateral agreements is that the product is widely available and attractive both to retailers and their customers. Because these generally recognized "redeeming virtues" intensify interbrand competition, nonprice vertical restraints have, since 1977, generally been upheld against antitrust challenge. *See Sylvania*, 433 U.S. at 54 (*quoting Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958)).

[8] *See, e.g.*, Miller Brewing Company, GUIDE TO READING COMPETITIVE CODE DATES 20 (rev. July 1994).

B. The Benefits to Consumers From Exclusive Dealer Territories Are Undercut by the Prohibition on Maximum RPM

While competition from dealers of similar products—interbrand competition—generally provides an effective constraint on any misuse by the dealer, the price of differentiated consumer products may not be fully controlled by such competition. *See ARCO*, 495 U.S. at 343 n.13 (maximum resale price fixing "may actually protect consumers against exploitation by the dealer"). For such products, consumers often will not have freely substitutable choices if the dealer raises the price. For example, in *Albrecht*, the St. Louis newspaper reader of the morning Globe-Democrat had no alternative delivered source for the Globe-Democrat—or, indeed, any other morning newspaper—and the newspaper delivery carrier who had an exclusive territory could (and did) raise the price of the newspaper above the advertised price. *Albrecht*, 390 U.S. at 147. Thus, after *Albrecht*, the consumer could be forced to pay more for the newspaper, and to the extent that newspaper subscribers were price sensitive, readership and advertising revenues would decline. In contrast, maximum RPM protects consumers from higher prices by imposing a ceiling that cannot be exceeded. *See ARCO*, 495 U.S. at 340 ("Low prices benefit consumers regardless of how those prices are set . . . .").

C. Maximum RPM Constrains Opportunism and Free Riding

Exclusive territory or customer arrangements prevent dealers from selling the same product outside their assigned sales territory and from thereby free riding on the service and promotional investments made by authorized dealers in that territory. *See Sylvania*, 433 U.S. at 55. In this context, the free-riding dealer has lower costs because

he does not pay for these promotions and consequently he can cut the price of the product below that charged by the servicing dealer. Without territorial protection, dealers will not invest in services such as total market coverage, product returns, cooperative advertising, etc.

For differentiated consumer products, nonprice vertical agreements unconstrained by maximum RPM create an opportunity for similar free-riding opportunism. That is, a dealer benefiting from a supplier's brand and product, protected from intrabrand competition by non-price restraints such as exclusive territories, may increase the retail prices of the product or service above the usual (competitive) mark-up. In doing so, the dealer benefits from the brand name and its reputation for quality but, as in *Albrecht*, denies the supplier part of the benefit of that brand by increasing price and reducing sales.[9] In the instant case, the dealer was not selling its own distinctive gasoline, but "Union 76" gasoline, a brand product with a separate identity and customer loyalty developed in part by competitive prices and services. *Cf. Simpson v. Union Oil Co.*, 377 U.S. 13 (1964).

The same is true of the beer market where brewers advertise their brands nationally to create a strong product identification and following. Such national promotions often include specials with substantial price breaks. Beer wholesalers participate because the brewer funds a portion of the price reduction and because it is in their interest to maintain demand. But an occasional beer wholesaler may take a short-run view and decline to participate in the promotional price. In doing so, that nonparticipating wholesaler injures the other wholesalers as well as

[9] The Court in *Albrecht* particularly erred in failing to take account of the newspaper's legitimate interest in protecting its circulation base against the opportunism of newspaper carriers. Circulation is critical to publishers because it determines advertising rates which are the largest source of newspaper revenues. *See* H. Hovenkamp, *Vertical Integration by the Newspaper Monopolist*, 69 Iowa L. Rev. 451, 455-56 (1984).

their brewer; that wholesaler is free riding on the national promotion subsidized in part by other wholesalers. The long-run effects of such opportunism are to reduce product promotions, reduce demand for that brand, and create disruptive consumer confusion.

D. Maximum RPM Allows Suppliers to Choose the Most Efficient Distribution System for Their Product or Service

In other words, exclusive territories joined with maximum RPM are often the most efficient degree of vertical integration. The *Albrecht* rule denies suppliers and dealers this choice. By forcing use of alternative distribution systems, the rule increases distributional costs which are passed on to consumers in competitive markets. In addition, such legal constraints unnaturally discourage independent business enterprises. Beer wholesalers, for example, are small businesses which add $52 billion of value annually to the economy and have an average of 32 employees.[10] Where the rule against maximum RPM can be avoided by other mechanisms (e.g., rebates, profit-passovers, minimum inventory levels and purchase requirements),[11] many of the same benefits can be achieved. But reliance on such semi-covert techniques is less efficient, includes additional problems, and is at most a second best solution.

[10] *See* Steve L. Barsby & Assocs., Inc., ECONOMIC CONTRIBUTIONS OF THE BEER INDUSTRY, 1995 (1996). The three-tier system of distribution of beer mandated in almost every state, *see* note 2, *supra*, was adopted under the 21st Amendment for public policy reasons to ensure greater state control over the sale and consumption of alcoholic beverages and to maintain an effective system of taxation of such products. *See North Dakota v. United States*, 495 U.S. 423, 426 & 428 (1990). That system is also highly effective for the distribution of perishable products. And a rule permitting maximum RPM justified on efficiency grounds is fully consistent with this state-mandated regulatory regime.

[11] *See* pp. 13-14, *infra*.

II. *ALBRECHT* IS BASED ON THE OVERRULED HOLDING IN *SCHWINN* AND IS WHOLLY INCONSISTENT WITH THE RULING IN *SYLVANIA*

Decided a year after *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), *Albrecht's* condemnation of maximum RPM is grounded in *Schwinn's per se* prohibition of vertical restraints and its assumption that exclusive territorial agreements are undesirable and anticompetitive. *See Albrecht*, 390 U.S. at 154. *Schwinn*, however, was expressly overturned by this Court's decision in *Sylvania*, 433 U.S. at 57. Thus, *Albrecht's* basic premise, that exclusive territorial agreements are rare and dealer opportunism unlikely, is no longer valid.

A. *Albrecht* Is the Stepchild of the Discredited *Schwinn* Doctrine

In holding that maximum vertical price fixing was *per se* illegal, the Court, in *Albrecht*, specifically rejected the reasoning of the lower court that "a price ceiling was necessary to protect the public from price gouging by dealers" who had exclusive rights in their own territories. 390 U.S. at 153. It explained that the court below had assumed, erroneously, "that the exclusive rights granted by [Schwinn] were valid under § 1 of the Sherman Act." *Id.* at 153-54 (*citing Schwinn*, 388 U.S. at 373 & 379). The *Albrecht* Court therefore concluded:

> The assertion that illegal price fixing is justified because it blunts the pernicious consequences of another distribution practice is unpersuasive. If, as the Court of Appeals said, the economic impact of territorial exclusivity was such that the public could be protected only by otherwise illegal price fixing itself injurious to the public, the entire scheme must fall under § 1 of the Sherman Act.

Id. at 154.

However, as the Court has recognized, the conclusion in *Albrecht* no longer follows once the premise of *Schwinn*

was overturned. *See ARCO*, 495 U.S. at 343 n.13 ("The procompetitive potential of a vertical maximum price restraint is more evident now than it was when *Albrecht* was decided, because exclusive territorial arrangements and other nonprice restrictions were unlawful *per se* in 1968."). *Albrecht* assumed, in light of the *Schwinn* prohibition, that few if any dealers would be freed of intrabrand competition or in a position to misuse that power contrary to the interests of the supplier, other dealers or consumers. It relied principally on the *per se* prohibition of exclusive territories to justify the same rule for maximum RPM. In contrast, *Sylvania* centered on the premise that "[v]ertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products." 433 U.S. at 54. These "redeeming virtues" justify "sustaining vertical restrictions under the rule of reason." *Id.*

B. *Albrecht* Cannot Be Reconciled With the Rule of Reason Standard Applied to Nonprice Restraints in *Sylvania*

Albrecht relied on three justifications to condemn maximum RPM: (1) vertical price agreements "'cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment'" (390 U.S. at 152, *quoting Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951)); (2) such restraints endanger competition "by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market" and thereby impede "the ability of buyers to compete and survive in the market" (*id.*); and (3) "the [maximum RPM] scheme tends to acquire all the attributes of an arrangement fixing minimum prices" (*id.* at 153). *See also Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 348 (1982).

Each of these rationalizations is rejected expressly or impliedly in *Sylvania*.[12] It upholds nonprice agreements that constrain a dealer's choices on where he can sell or must promote the supplier's product, that allow the supplier to select dealer territories, and that eliminate all intrabrand competition. Maximum RPM satisfies the *Sylvania* criteria because such agreements are designed to "increase economic efficiency and render markets more, rather than less, competitive." *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978). The prohibition on maximum RPM also is counterproductive. It has the perverse effect of encouraging forward vertical integration as, for example, newspaper publishers have shifted to self-distribution.[13] *See Sylvania*, 433 U.S. at 57 n.26 ("To the extent that a *per se* rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system . . . ."); *Business Electronics*, 485 U.S. at 725 (recognizing that harsh treatment of vertical restraints "create[s] a perverse incentive for manufacturers to integrate vertically into distribution"). And, as in *Sylvania*, the "great weight of scholarly opinion has been critical" (433 U.S. at 47-48) of *Albrecht*.[14]

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[12] The Court did not directly address the issue of disguised price minima in *Sylvania*, although it did reject the likelihood that exclusive territories would lead to horizontal price cartels. 433 U.S. at 51 n18. *See also* P. Areeda, VIII ANTITRUST LAW ¶ 1637 at 406 (1989) ("there is little or no reason to fear that a vertical maximum might be an undetected minimum").

[13] *See also Paschall v. Kansas City Star Co.*, 727 F.2d 692 (8th Cir.) (*en banc*), *cert. denied*, 469 U.S. 872 (1984) (replacement of independent carriers by delivery agents who are employees of the newspaper); H. Hovenkamp, *supra* note 9, at 460 ("by switching to self-distribution, the *Kansas City Star* hoped to eliminate monopoly pricing by its carriers while avoiding the consequences of *Albrecht*").

[14] Economists: *see* F. Scherer & D. Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 558 (3d ed. 1990) ("Quite

III. THE ILLOGIC AND INCONSISTENCY OF *ALBRECHT'S* CONDEMNATION OF MAXIMUM RPM HARMS COMPETITION AND CAUSES PARTIES TO RELY ON LESS EFFICIENT VERTICAL RESTRAINTS

Continued adherence to the standard of *per se* illegality for maximum RPM while similar more restrictive exclusive territory agreements are tested under a rule of reason is not merely a harmless anomaly of antitrust asymmetry. Few decisions "have proved more anticompetitive" than *Albrecht*. H. Hovenkamp, FEDERAL ANTITRUST POLICY 422 (2d ed. 1994). Few have interfered so directly with higher output, lower prices or supplier profits. Worse yet, the "luminous inconsistency"[15] between *Albrecht* and *Sylvania* causes parties to invent circuitous (and more expensive) alternatives with resulting litigation burdens as each is tested to learn whether another exception to *Albrecht* will find judicial approval. *See Sylvania*, 433 at 48-49 & n.14 ("the experience of the past 10 years should be brought to bear on this subject"). While courts, including this Court, have sought to limit the harm caused by *Albrecht* by applying it narrowly,[16] by approving alternatives[17] or by finding that conduct cannot be chal-

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clearly, [maximum RPM] should not be illegal per se."); R. Blair & A. Esquibel, *Maximum Resale Price Restraints in Franchising*, 65 Antitrust LJ. 157, 160 n.16 (1996) (collecting studies). Legal scholars: *see* P. Areeda, *supra* note 12, ¶ 1638b at 419 ("[V]ertical price ceilings should not be condemned per se. Instead, they should be permitted unless the plaintiff proves them unreasonable in the particular case."); R. Bork, THE ANTITRUST PARADOX 435-36 (rev. ed. 1993) (criticizing the "illogical distinction" applied to vertical price restraints); S. Ross, PRINCIPLES OF ANTITRUST LAW 255 (1993) ("*Albrecht* seems wrongly decided").

[15] R. Bork, *supra* note 14, at 285.

[16] *See* note 4, *supra*.

[17] *Jack Walters & Sons Corp. v. Morton Building, Inc.*, 737 F.2d 698, 706 (7th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (presumption that action in supplier's self-interest is unilateral).

lenged by a particular plaintiff,[18] the social welfare costs of these covert reversals are substantial. *Cf.* R. Posner, ANTITRUST LAW, AN ECONOMIC PERSPECTIVE 10-11 (1976).

Parties seeking the same ends are forced to adopt less efficient substitutes for RPM. These include: integration of manufacturing and distribution in one firm;[19] dual distribution arrangements;[20] national contracts;[21] sales quotas and related performance standards;[22] and price announcements and rebates.[23] The price clause in the lease agreement in the instant case is illustrative. The parties to the agreement apparently assumed that a lease would be interpreted as a rental agreement despite its supply and price terms, that it did not constitute an agreement to resell gasoline, and that it did not meet the "specific price or price levels" standard. They guessed wrong up to now.

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[18] *ARCO*, 495 U.S. at 339 (nonpredatory price cut imposed on competing dealer through maximum RPM not challengeable where plaintiff could not show antitrust injury); *Jack Walters*, 737 F.2d at 709.

[19] *See Slowiak v. Land O'Lakes, Inc.*, 987 F.2d 1293 (7th Cir. 1993) (termination of dealer).

[20] *See Jack Walters*, 737 F.2d at 706 (threat of direct sales to public if advertised prices not followed).

[21] *See Wisconsin Music Network, Inc. v. Muzak Ltd. Partnership*, 5 F.3d 218 (7th Cir. 1993) (price restraints in national franchise contract judged under rule of reason).

[22] *See* A. Shephard, *Contractual Form, Retail Price, and Asset Characteristics in Gasoline Retailing*, 24 Rand J. Econ. 58, 62 (1993) (gasoline franchise contracts usually specify minimum volumes of gasoline to be purchased).

[23] *See, e.g., Acquaire v. Canada Dry Bottling Co. of N.Y., Inc.*, 24 F.3d 401 (2d Cir. 1994) (verification that promotional discount received by retailer); *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983).

IV. THIS IS AN APPROPRIATE OCCASION TO OVERRULE THE OUTMODED *PER SE* PROHIBITION OF MAXIMUM RPM

The *per se* rule against maximum RPM is a relic of another era in antitrust and should be expressly overruled. It is inconsistent with the rule of reason applied to parallel nonprice vertical restraints. Its rationale and doctrinal support have evaporated in the last 30 years. And its overruling would not disrupt any industry built upon its base. Thus, as this Court held in *Sylvania* and *Copperweld*, when similar antique antitrust doctrines were expressly repudiated by the Court to bring antitrust law into line with modern economic and legal analysis, the rule of *Albrecht* should be relegated to history. *See Schwinn*, 388 U.S. at 391 (Stewart, J., dissenting: "it is hardly the practice of this Court to embrace a rule of law merely on grounds of its antiquity").

A. *Albrecht's Per Se* Rule, Like Those in *Schwinn* and *Kiefer-Stewart*, Has Caused Suppliers and Dealers to Adopt Less Efficient Business Methods, Has Generated Complex Legal Distinctions, and Has Created Unnecessary Confusion

While it is important that the law be settled, it is even more important that basic rules which have a substantial impact on important and recurring business relationships be decided correctly. Thus, in *Sylvania* this Court held that a perverse *per se* prohibition of nonprice vertical restraints should no longer continue. It was too important a commercial subject to be governed by a counterproductive rule; the *per se* prohibition was based on an erroneous extension of a rule first applied to horizontal restraints; it had generated extensive litigation as businesses sought similar efficiencies by other means; its "barren formalism" was an analytical embarrassment; and its overturning was likely to lead to greater efficiencies by controlling free riding and similar practices contrary to effective distribution. 433 U.S. at 48-54. Each of these reasons, relied

upon in *Sylvania* to overturn *Schwinn*, applies with equal force to justify reversal of *Albrecht* here.

Similarly, in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984), this Court expressly "disapproved and overruled" the malign intra-enterprise conspiracy doctrine of *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947), and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951). Again, this doctrine had "long been criticized" because the rule looked to "the form of an enterprise's structure and ignore[d] the reality" and because it interfered with efficient organizational forms and encouraged covert subsidiaries. *Id.* at 766 n.12, 772 & 773. The Court pointedly noted that "it ha[d] never explored or analyzed in detail the justifications for [the intra-enterprise conspiracy doctrine]" (467 U.S. at 766) and on doing so, it found that the rule had irrationally "obliterate[d] the [Sherman] Act's distinction between unilateral and concerted conduct" (*id.* at 776). As a consequence, the Court reversed itself and adopted a new rule recognizing the parent-subsidiary corporate relationship as one economic entity despite the fact that the Court had adopted a contrary rule 37 years earlier (and followed or repeated the holding in subsequent cases). The same reasons—of an ancient rule relying on form not substance and of an inefficient rule encouraging covert forms to overcome its strictures—apply to the *Albrecht* rule here.

B. Contrary to the Situation in *Toolson* and *Flood*, Reversal of *Albrecht* Would Not Interfere With an Industry's Reasonable Expectations or Eliminate a Rule That Had Been Implicitly Approved by Congress

This Court has twice refused to overturn the aberrational and anomalous rule in *Federal Baseball Club of Baltimore, Inc. v. National League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922)—that baseball is not so involved in interstate commerce as to be covered

by the antitrust laws—because "the [baseball] business . . . [was] left for thirty years to develop, on the understanding that it was not subject to existing antitrust legislation." *Toolson v. New York Yankees, Inc.*, 346 U.S. 356, 357 (1953) (*per curiam*). *Accord Flood v. Kuhn*, 407 U.S. 258 (1972). The Court was unwilling to overturn *Federal Baseball* judicially when Congress, by its "positive inaction," allowed those decisions to stand and "ha[d] clearly evinced a desire not to disapprove them legislatively." *Flood*, 407 U.S. at 283-84.

Albrecht cannot be defended on these grounds. The ban on maximum RPM is not an exemption from antitrust coverage; no industry has been built on its rule; and none will be disrupted by correcting its harshness and illogic. Just the opposite. *Albrecht* interferes with the operation of efficient distributional systems for goods and services and permits the kinds of opportunism that this Court was concerned about in *Sylvania*, *Monsanto* and *Business Electronics*. Expunging it from antitrust will free suppliers and dealers to lower costs and improve efficiency. And no confusion or retroactivity problems would result from discarding this inconsistency in the treatment of restraints ancillary to exclusive territories.

Finally, Congress has not considered legislation on *maximum* vertical price fixing nor is there any evidence that Congress supports continuation of the rule in *Albrecht*. In creating the "fair trade" exemption from the Sherman Act in the Miller-Tydings Act, 50 Stat. 693 (1937), and the McGuire Act, 66 Stat. 631 (1952), Congress was protecting *minimum* vertical price fixing. When it repealed those exemptions in the Consumer Goods Pricing Act, Pub. L. No. 94-145, 89 Stat. 801 (1975) (amending 15 U.S.C. §§ 1, 45(a)), Congress was acting on a concern that the exemptions had raised consumer prices. *See* S. Rep. No. 466, 94th Cong., 1st Sess., 3 (1975), *reprinted in* 1975 U.S. Code Cong. & Admin. News 1569, 1570 ("[r]epeal of the Fair Trade laws should result in a lowering of consumer prices"). Similarly, more recent failed efforts

to codify the rule of *Dr. Miles*, 220 U.S. 373, have specifically excepted from *per se* condemnation agreements to set, change or maintain maximum resale prices. S. Rep. No. 42, 102d Cong., 1st Sess., 17-18 (1991) ("although [S. 429 would codify] the *per se* rule for minimum price-fixing, it contains a specific exception for agreements to set, change, or maintain maximum resale prices").

CONCLUSION

The Court should expressly overrule the *per se* standard of *Albrecht* and hold that maximum vertical price agreements henceforth are tested by the rule of reason standard set forth in *Sylvania*.

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